United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1927

444

No. 4633.

ALFRED M. ENDNER, APPELLANT,

vs.

SAMUEL D. FRAZIER, CHARLES S. MYERS, AND CARL PUSTAU, JR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 21, 1927.

PRINTED NOVEMBER 17, 1927.

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Court of Appeals of the District of Columbia

No. 4633.

ALFRED M. ENDNER, Appellant,

vs.

SAMUEL D. FRAZIER et al.

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a Supreme Court of the District of Columbia.

At Law.

No. 68915.

ALFRED M. ENDNER, Plaintiff,

vs.

SAMUEL D. FRAZIER, CHARLES S. MYERS, and CARL PUSTAU, JR., Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed May 26, 1924.

In the Supreme Court of the District of Columbia.

At Law.

No. 68915.

ALFRED M. ENDNER, Plaintiff,
v.
SAMUEL D. FRAZIER, CHARLES S. MYERS, and CARL PUSTAU, JR., Defendants.

First Count.

The plaintiff, Alfred M. Endner sues the defendants Samuel D. Frazier, Charles S. Myers and Carl Pustau, Jr., the said Pustau and the said Myers being co-partners, for that heretofore to wit the plaintiff on May 2, 1921 at the instance and request of the said defendant Pustau advanced and paid to the defendant Samuel D. Frazier then and there representing himself to be and acting as agent for the defendant Myers and for the joint account and use of the said defendants Pustau and Myers as co-partners, the sum of Six Thousand Dollars ($6,000.00) upon the following representations, promises and conditions, to wit, the said Six Thousand Dollars was to be used solely for the purpose of making an initial payment or deposit to the United States Government upon the purchase from the said Government by the said Pustau and the said Myers acting as co-partners of certain automobile vehicles or trucks which were about to be sold as surplus property of the United States; that the said trucks were to be immediately resold by the said partners and the said sum of Six Thousand Dollars ($6,000.00) so advanced by plaintiff was to be immediately repaid to plaintiff; that the said defendants then and there promised that if the aforesaid purchase of said
2 trucks was not made or completed within two weeks thereafter, to wit after May 2, 1921, the said sum of Six Thousand Dollars ($6,000.00) would be immediately refunded to plaintiff; that the said purchase of said trucks

from the United States Government was never made or consummated by the said defendants or either of them, nor was the said sum of Six Thousand Dollars ($6,000.00) or any part thereof ever deposited or paid to the said United States Government on account of the said purchase of trucks or otherwise; that although the defendants promised to repay to the plaintiff the said sum of Six Thousand Dollars ($6,000.00) and although often demanded, the defendants have not nor have either of them or anyone for them or either of them paid the said sum or any part thereof, wherefore the plaintiff claims the sum of Six Thousand Dollars ($6,000.00) with interest thereon from July 30, A. D. 1921, besides costs of suit.

Second Count.

The plaintiff, Alfred M. Endner sues the defendants Samuel D. Frazier, Charles S. Myers and Carl Pustau, Jr., the said Pustau and the said Myers being co-partners, for that heretofore to wit the plaintiff on May 7, 1921 at the instance and request of the said defendant Pustau advanced and paid to the defendant Pustau for the joint account and use of the said defendants Pustau and Myers as co-partners, the sum of Seven Hundred and Seventy-five Dollars ($775.00) upon the following representations, promises and conditions, to wit, the said Seven Hundred and Seventy-five Dollars ($775.00) was to be used solely for the purpose of making an initial payment or deposit to the United States Government upon the purchase from the said Government by the said Pustau and the said Myers acting as co-partners of certain automobile vehicles or trucks which were about to be sold as surplus property of the United States;
3 that the said trucks were to be immediately resold by the said partners and the said sum of Seven Hundred and Seventy-five Dollars ($775.00) so advanced by plaintiff was to be repaid to plaintiff on or before May 16, 1921; that the said defendants then and there promised that if the aforesaid purchase of said trucks was not made or completed on or before May 16, 1921, the said sum of Seven Hundred and Seventy-five Dollars ($775.00) would be immediately refunded to plaintiff; that the said purchase of said trucks from the United States Government was

never made or consummated by the said defendants or either of them, nor was the said sum of Seven Hundred and Seventy-five Dollars ($775.00) or any part thereof ever deposited or paid to the said United States Government on account of the said purchase of trucks or otherwise; that although the defendants promised to repay to the plaintiff the said sum of Seven Hundred and Seventy-five Dollars ($775.00) and although often demanded, the defendants have not nor have either of them or anyone for them or either of them paid the said sum or any part thereof; wherefore the plaintiff claims the sum of Seven Hundred and Seventy-five Dollars ($775.00) with interest thereon from July 30, A. D. 1921, besides costs of suit.

Count Three.

The plaintiff, Alfred M Endner sues the defendants Samuel D. Frazier, Charles S. Myers and Carl Pustau, Jr., the said Pustau and the said Myers being co-partners, for that heretofore to wit the plaintiff on June 7, 1921, at the instance and request of the said defendant Frazier advanced and paid to the defendant Samuel D. Frazier then and there representing himself to be and acting as agent for the defendant Myers and for the joint account and use of the said defendants Pustau and Myers as co-partners, the sum of Seventy-five Hundred Dollars ($7,500.00) upon the following representations, promises and conditions, to wit, the said Seventy-five Hundred Dollars ($7,500.00) was to be used solely for the purpose of making an initial payment or deposit to the United States Government upon the purchase from the said Government by the said Pustau and the said Myers acting as co-partners, of certain automobile vehicles or trucks which were about to be sold as surplus property of the United States; that the said trucks were to be immediately resold by the said partners and the said sum of Seventy-five Hundred Dollars ($7,500.00) so advanced by plaintiff was to be repaid within thirty (30) days from June 7, 1921 to plaintiff; that the said defendants then and there promised that if the aforesaid purchase of said trucks was not made or completed within thirty (30) days, to wit after June 7, 1921, the said sum of Seventy-five Hundred Dollars ($7,500.00) would be immediately refunded to plaintiff, that the said

4

purchase of said trucks from the United States Government was never made or consummated by the said defendants or either of them, nor was the said sum of Seventy-five Hundred Dollars ($7,500.00) or any part thereof ever deposited or paid to the United States Government on account of the said purchase of trucks or otherwise; that although the defendants promised to repay to the plaintiff the said sum of Seventy-five Hundred Dollars ($7,500.00) and although often demanded, the defendants have not nor have either of them or anyone for them or either of them paid the said sum of any part thereof, wherefore the plaintiff claims the sum of Seventy-five Hundred Dollars ($7,500.00) with interest thereon from July 30, A. D. 1921, besides costs of suit.

Count Four.

The plaintiff, Alfred M. Endner sues the defendants, Samuel D. Frazier, Charles S. Myers and Carl Pustau, Jr., the said Pustau and the said Myers being co-partners, for money payable by the defendants to the plaintiff for goods sold and delivered by the plaintiff to the defendants; and for work done and material provided by the plaintiff for the defendants at their request; and for money lent by the plaintiff to the defendants; and for money paid by the plaintiff for the defendants at their request; and for money received by the defendants for the use of the plaintiff; and for money found to be due from the defendants to the plaintiff on accounts stated between them. And the plaintiff claims Fourteen Thousand, Two Hundred and Seventy-five Dollars ($14,275.00) with interest from the 30th day of July, A. D. 1921, according to the affidavit hereto annexed.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

* * * * * * *

Affidavit.

STATE OF NEW YORK,
County of Kings, ss:

Alfred M. Endner, being first duly sworn, deposes and says that he is a citizen of the State of New York and a

resident of Brooklyn, New York; that on May 2, 1921 at the instance and request of one Carl Pustau, Jr., he advanced and paid to one Samuel D. Frazier of Washington, D. C., one of the defendants in the above entitled cause, who then and there represented himself as the agent of and as acting for one Charles S. Myers, also a defendant herein, the sum of Six Thousand Dollars ($6,000.) in cash upon the following representations and under the following conditions, to wit; the said Pustau and the said Frazier advised and informed deponent that the said Pustau and the said Myers had an opportunity to purchase from the United States Government for the sum of Seventy-five Thousand Dollars ($75,000.) fifty (50) automobile trucks which
6 were about to be sold as surplus property of the United States Post Office Department or of the United States Army; that they had immediate resale for said trucks at a considerable profit; that it was necessary, in order to secure said trucks, to deposit at once with the United States Government the sum of Seventy-eight Hundred Dollars ($7,800.) as an initial payment on the purchase price of the said trucks; that the profits which were to be derived from the said purchase and resale of said trucks were to be equally divided between the said Pustau and the said Myers who were partners in the transaction, and that out of the proceeds of said transaction there would be returned to deponent not only the said sum of Six Thousand Dollars ($6,000.) which as aforesaid he was asked to advance, but also certain other moneys which were owing to him by the said Pustau for sums previously advanced by said deponent to the said Pustau. Deponent thereupon agreed to advance and did advance the aforesaid sum of Six Thousand Dollars ($6.000.) with the distinct understanding and agreement that if the aforesaid transaction with respect to the purchase and sale of the said trucks was not completed within two weeks from that date (May 2, 1921) the said sum or Six Thousand Dollars ($6,000.) was to be refunded to deponent; that pursuant to the said understanding and agreement the said sum of Six Thousand Dollars ($6,000.) was paid into the hands of the said Samuel D. Frazier for the purpose of making the initial payment aforesaid. Deponent further says that the said transaction with respect to the purchase and resale of said trucks was never consummated or completed;

that neither the said trucks nor any of them was ever purchased or received from the Government; that neither the aforesaid sum of Seventy-eight Hundred Dollars ($7,800.) nor any portion thereof was ever paid by the said Frazier, or the said Myers, or the said Pustau to
7 the United States Government as an initial payment on the purchase price of the said trucks or otherwise, nor has the said sum of Six Thousand Dollars ($6,000.) so advanced by deponent or any portion thereof ever been refunded, repaid, or returned to deponent, although demand therefor has been repeatedly made by said deponent upon the said Frazier, the said Pustau and the said Myers. Thereafter on or about May 7, 1921, the said Pustau, partner of the said Myers represented to deponent that they had not been able to raise the full sum of Seventy-eight Hundred Dollars ($7,800.) which was necessary to make the initial payment for the purchase of the aforesaid trucks and asked deponent to advance additional money; that deponent then and there on May 7th, 1921, agreed to and did advance and paid to the said Pustau for the purpose and use aforesaid by the said Pustau and the said Myers, his partner, the further sum of Seven Hundred and Seventy-five Dollars ($775.) with the understanding and agreement that the said sum was to be returned to deponent on or before May 16, 1921 if the aforesaid transaction should not go through; and deponent further says that neither the said sum of Seven Hundred and Seventy-five Dollars ($775.) nor any portion thereof was ever paid by the said Pustau or the said Myers to the United States Government on account of the aforesaid initial payment on the purchase price of the said trucks or otherwise, nor was the said sum of Seven Hundred and Seventy-five Dollars ($775.) so advanced by deponent or any portion thereof ever refunded, repaid or returned to deponent although demand therefor was repeatedly made by said deponent upon the said Pustau and the said Myers. And deponent further says that thereafter on or about June 7, 1921, at the instance and request of the said Frazier, the said Pustau and the said Myers and for a similar purpose, namely an initial payment on the proposed purchase of further or additional motor vehicles from the said United
8 States Post Office Department or the said United States Government, deponent advanced and paid

to the said Frazier acting and representing himself as the agent of the Myers and for use by the said Myers and the said Pustau in the purchase by them as partners of said additional motor vehicles, the sum of Seventy-five Hundred Dollars ($7,500.) upon the understanding and agreement that the same was to be used as a deposit on the purchase of the aforesaid motor vehicles only which were to be delivered in thirty (30) days thereafter, in default of which the said sum of Seventy-five Hundred Dollars ($7,500.) was to be returned to deponent without interest; that neither the said motor vehicles nor any of them were purchased or received from the Government; that neither the aforesaid sum of Seventy-five Hundred Dollars ($7,500) nor any portion thereof was ever paid by the said Frazier or the said Myers, or the said Pustau to the United States Government as such initial payment or deposit on the purchase of the said motor vehicles or otherwise, nor had the said sum of Seventy-five Hundred Dollars ($7,500) so advanced by deponent or any portion thereof ever been refunded, repaid or returned to deponent although demand therefor has been repeatedly made by said deponent upon the said Frazier, the said Pustau and the said Myers; that the said Pustau and the said Myers and Frazier have repeatedly promised to repay to deponent the sum aforesaid amounting in the aggregate to Fourteen Thousand, Two Hundred and Seventy-five Dollars ($14,275) and notwithstanding said promises said defendants have not nor has any one for them or either of them paid the said sum of Fourteen Thousand, Two Hundred and Seventy-five Dollars ($14,275) or any part thereof and there is now justly due and owing to plaintiff from the defendants the sum of Fourteen Thousand, Two Hundred and Seventy-five Dollars ($14,275) with
9 interest from the 30th day of July, 1921, exclusive of all set-offs and just grounds of defense.

ALFRED M. ENDNER.

Subscribed and sworn to before me this 18th day of February, A. D. 1924.

[SEAL.]

JULIA SMITH,
Notary Public, Kings County.

Kings County Clerk's No. 753.
Kings County Register's No. 5384.
Term Expires March 30, 1925.

Memoranda.

June 23, 1924.—Summons returned served Samuel D. Frazier, personally—May 26, 1924; Charles S. Myers and Carl Pustau, Jr. not to be found June 21, 1924.

July 16, 1924.—Pleas of defendant Frazier, affidavit of defense and Appearance of Gardiner and Tomlinson—filed.

January 26, 1926.—Dismissed W. P. and notice.

Motion to Revive Cause.

Filed September 30, 1926.

* * * * * * *

Comes now the plaintiff, Alfred M. Endner, by his attorney, G. Thomas Dunlop, and moves the Court that this cause be revived and restored to the trial calendar.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

10 *Notice*

To Messrs. W. Gwynn Gardiner and J. Wm. Tomlinson, Attorneys for Samuel D. Frazier, codefendant:

Take notice that the above Motion will be called for hearing at ten o'clock A. M. on Friday, October 8, 1926, or as soon thereafter as counsel can be heard.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

Service of a copy of the above Motion accepted this 30th day of Sept. 1926.

W. GWYNN GARDINER,
Attorney for Defendant, Samuel D. Frazier.

Affidavit in Support of Motion to Revive Cause.

Filed September 30, 1926.

* * * * * * *

STATE AND CITY OF NEW YORK,
County of Kings, ss:

Alfred M. Endner, being duly sworn, deposes and says: That he is the plaintiff in the above entitled matter.

That on or about the 15th day of December, 1923, he retained Daniel J. Griffin, an attorney and counselor at law with offices at 44 Court Street, Brooklyn, New York, to represent him and bring action against the defendants above named.

That on or about the 10th day of February, 1924, your deponent in company with Mr. Griffin visited Washington and there consulted Mr. G. Thomas Dunlop an attorney of Washington, D. C. That at the aforementioned time the said Daniel J. Griffin engaged Mr. G. Thomas Dun-
11 lop to represent plaintiff in the above matter.

That Mr. Griffin, Mr. Dunlop and your deponent went over the facts of the case. Mr. Griffin gave certain data to Mr. Dunlop and made a promise to send other information to Mr. Dunlop's office which the latter desired.

Your deponent returned to the Borough of Brooklyn, City of New York and kept in touch almost daily with the said Daniel J. Griffin, and sometime in the month of February, 1924 the papers for the prosecution of case which had been prepared by Mr. Dunlop and sent to Mr. Griffin were executed and returned to Mr. Dunlop. Due to the absence of two of the defendants from the District of Columbia filing of the declaration was delayed until the month of May in the hope that the absent defendants might be found in the District of Columbia for service of process. It having been found impossible however to find the defendants Myers and Pustau in the District of Columbia the declaration was on the 26th day of May, 1924 filed and on the same day service of process was had on the defendant Frazier. That thereafter and about three or four times a week your deponent would inquire of Mr.

Griffin's office as to what progress they were making in his matter and Mr. Griffin from time to time told your deponent he had heard nothing from Mr. Dunlop; but that he would go down to Washington and find out the status of the matter.

That your deponent is advised and verily believes that Mr. Dunlop sent several communications to Mr. Griffin to which he, Mr. Dunlop, received no reply, and that thereafter and on or about the 27th day of January, 1926 the matter was brought on before the Supreme Court of the District of Columbia and dismissed for want of prosecution.

12 That during the months of January, February, March, April and May, 1926 your deponent has been in Mr. Griffin's office at least four or five times a week inquiring about his matter in Washington, but that the said Mr. Griffin promised weekly to go down to Washington or communicate with Mr. Dunlop to find out the status of the case. That although Mr. Griffin denied to your deponent having received any communications from Mr. Dunlop, the files in Mr. Dunlop's office show that Mr. Griffin was advised in writing by Mr. Dunlop as to the status of the case and requests made for action thereon. As the result of the negligence of the said Griffin or of the Postal Authorities of the United States in failing to deliver to the said Griffin the communications aforesaid your deponent was not advised and was unaware of the status of the cause or of the requests made of Mr. Griffin by Mr. Dunlop until on July 29, 1926 when deponent received a letter directly from Mr. Dunlop in reply to a letter on the previous day from deponent to Mr. Dunlop in person advising that he had been unable to get information from Mr. Griffin and requesting that Mr. Dunlop advise him directly and in person of the status of his case.

That this is an action in which the defendant Frazier representing himself as the agent of the defendants Myers and Pustau and for the alleged purpose of buying certain automobiles from the United States Government received over $13,000.00 in cash from your deponent with the understanding and promise that it would be returned to deponent as set forth in the declaration hereinbefore filed.

That no part of the said money has been returned or paid to plaintiff and plaintiff has a good cause of action which he will be able to verify by competent proof.

13 That the defendant Frazier has admitted to your deponent in the presence of a witness that he received the said money from plaintiff; that it was not used to purchase any automobiles from the United States Government, but on the contrary that he, Frazier, immediately applied it to the payment of the debts of Carl Pustau, Jr. one of the co-defendants.

That within three years prior to the filing of the declaration in this cause the defendant Frazier received part of the money so advanced, acknowledged receipt of the entire amount and promised to return the same to plaintiff.

ALFRED M. ENDNER.

Subscribed and sworn to before me this 17th of September, A. D. 1926.

OLGA L. DERR,
Commissioner of Deeds, City of New York.

Kings County Register's No. 7025.
Kings County Clerk's No. 26.
Queens County Clerk's No. 1653.
Commissions Expires May 12, 1927.

STATE OF NEW YORK,
County of Kings, ss:

I, William E. Kelly, Clerk of the County of Kings and also Clerk of the Supreme Court for said County (said Court being a Court of Record), do hereby certify that Olga L. Derr, whose name is subscribed to the certificate of proof, acknowledgment or deposition of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Commissioner of Deeds in and for the City of New York, commissioned and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Commissioner and verily believe that the signature to the said certificate or proof, acknowledgment or deposition is genuine, and that the same is executed and acknowledged according to the laws of the State of New York.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said County and Court, this 28 day of Sept., 1926.

[SEAL.] WILLIAM E. KELLY,
Clerk.

14 *Affidavit in Opposition to Motion to Revive Cause.*

Filed October 15, 1926.

* * * * * * *

CITY OF WASHINGTON,
District of Columbia, ss:

Samuel D. Frazier, being first duly sworn deposes and says that he is one of the defendants in the above entitled cause.

He states in opposition to the motion to revive this cause the following facts:

This suit was instituted for the purpose of recovering certain moneys which is claimed to have been delivered to this defendant by the plaintiff through one Pustau in 1921.

The suit was instituted on May 26, 1924. Subpœnaes were issued for the three defendants named in said cause, to wit, Samuel D. Frazier, Charles S. Myers and Carl Pustau, Jr. On June 23, 1924, the marshal made his return thus: "Served Number One, others not found."

On July 26, 1924, this deponent, who was defendant No. 1, filed his pleas and affidavit of defense, and served copies of same on counsel for the plaintiff on said day.

On January 26, 1926, this suit was dismissed with the following entry of record: "Dismiss- W. P. and notice."

On February 17, 1926, the balance of the deposit was returned to G. Thomas Dunlop by check.

On September 30, 1926, a deposit was made by the plaintiff's counsel, and this motion to revive was filed.

All as shown by the docket entries found in the Clerk's Office of the Supreme Court of the District of Columbia in the above entitled cause.

Deponent advises the Court that the plaintiff is a
15 non-resident, and was at the time of the institution of this suit a non-resident, residing, then and now, in the city of New York, State of New York.

That the co-defendant Pustau was at the time of the institution of this suit, at the time of the payment of the moneys the subject of this suit, and for a long time thereafter, actually residing in the City of New York, although he was, according to the information and belief of this deponent, at the time of the institution of this suit in the District of Columbia and remained in the District of Columbia for some time thereafter.

That at the time of the transaction complained of, this defendant's co-defendant Myers was a resident of the District of Columbia, and actually resided in the District of Columbia and continued to reside in the District of Columbia for some years thereafter.

Deponent is now advised that his co-defendant Pustau was last seen or heard of as being in China, he having been seen in China within the last six months.

Deponent is advised that his co-defendant Myers is no longer a resident of the District of Columbia, does not reside in the District of Columbia, and is now out of the jurisdiction of this court.

No bond for costs has ever been filed by the plaintiff.

Deponent further advises the Court that G. Thomas Dunlop, Esq., who makes this motion, was counsel of record for the plaintiff in this cause when the suit was instituted in 1924, and is the only counsel appearing of record for the plaintiff in said above entitled cause.

Deponent further advises the Court that at the time these transactions complained of were had in 1921, the
16 plaintiff knew that this deponent disclaimed any liability to him either morally or legally.

This deponent further advises the Court that the plaintiff in this cause through his counsel sought through the District Attorney's office of the District of Columbia, and through the Department of Justice of the United States, to obtain an indictment against this deponent claiming improper conduct on the part of this deponent in receiving the moneys, the subject of complaint in the declaration.

This deponent further advises the Court that at that time he employed counsel now representing him, and he was advised by counsel now representing him of record in this cause, that the plaintiff, or counsel representing the plaintiff was then told that this defendant would not recognize

any liability or pay one cent, since in the opinion of counsel representing this deponent there was no liability, morally or legally, on the part of this deponent to pay to the plaintiff or any one for him any sum of money growing out of the transaction complained of in the declaration.

This deponent further advises the court that he is advised by his counsel now representing him that shortly after the efforts of the plaintiff through counsel to obtain an indictment against this deponent failed, he employed counsel in the District of Columbia who sought to obtain moneys from this deponent by threatening suit, and that at that time, which was in the year 1922, this deponent, through his counsel, refused to pay one cent. Thereafter other and different counsel was employed and this suit was instituted.

The facts taking place since the institution of the suit are as stated above.

17 This deponent advises the court that by reason of the failure of the plaintiff to diligently prosecute the case and to have alias writs issued and served upon the defendants Pustau and Myers, and especially upon the defendant Pustau, that he will be deprived of his defense, or a great portion of his defense, should the case be now called for trial, and that by reason of the delay he will be unable to obtain service on the defendants himself or to bring them before the Court, and thus he will be deprived of his right to make a complete defense to the action since it is necessary to have the testimony of the defendant Pustau in order to make such defense complete.

For these reasons this defendant opposes the motion to revive said cause.

SAMUEL D. FRAZIER.

Subscribed and sworn to before me this 15 day of October, A. D. 1926.

[SEAL.] EVA W. SAMPSON,
Notary Public.

My Commission Expires Nov. 10th, 1930.

Memorandum on Submission After Hearing on Motion to Revive the Above-entitled Action.

Filed March 28, 1927.

* * * * * * *

The record shows that this action was instituted on May 26, 1924, and defendant Frazier personally served with process on the same day and a return of "not to be found" made as to the remaining defendants. Frazier pleaded to the declaration on July 16, 1924. No further steps were taken by the plaintiff to bring the cause to trial on
18 the issues reached by Frazier's pleas, for no note of issue was filed and no notice of trial given by either of the parties and hence the case was never calendared for trial. Law Rules 33, 34 and 35. This situation continuing for more than a year the case was, on *January* 26, 1926, dismissed without prejudice pursuant to Law Rule 74, and notice thereof given to the plaintiff's counsel of record as required by that rule. On *September* 30, 1926, eight months and four days after the dismissal, the pending motion was filed. The motion itself was not filed for slightly over two months after the plaintiff himself, according to his affidavit filed in support of the pending motion, knew of the dismissal of his case.

Law Rule 74 is in the following language:

"Dismissal of Causes. When any party to a cause other than criminal or bankruptcy is in default for failure to plead, or to notice for trial a cause in which an issue of law or of fact has been raised and such default has continued for one year, the clerk of this court shall enter in the docket the words "Dismissed W. P.," together with the date of such entry, meaning dismissed without prejudice and without costs to either party, and shall immediately give notice, in writing, of such action to counsel of record for plaintiff, or to plaintiff himself if no counsel of record for plaintiff appears; provided, however, that on application of either party and for cause shown, such cause so dismissed may be revived and its prosecution resumed, and for the purpose of such revival the term of court at

which such entry is made is extended for a period of six months thereafter."

From this rule it is to be observed that for the purpose of the revival of a cause dismissed as this one was, "the term of court at which such entry" (the entry of dismissal) "is made is extended for a period of six months thereafter." In this case the term of court in which the entry was made, expired at the close of April 5, 1926, except as extended by the operation of said Law Rule 74.

On behalf of the plaintiff, it is contended that the correct construction of the rule requires that it should be
19 held that the six months extension period, therein prescribed, commences from the expiration of the *term,* and that so construed the pending motion was filed in time. If this is the correct construction the pending motion was filed in time. But is it? When the motion was argued, there was pending in the Court of Appeals, the case of Nealon vs. Davis, and it was suggested that the Court await the decision of the appellate tribunal before passing upon the pending opinion. In this counsel for the respective parties acquiesced. That decision has now been announced.

The suggestion that this decision be awaited, was made because it was thought that it might shed light upon the question presented by the pending motion. It does. In this Court's opinion it, in effect, decides the question.

In the Nealon-Davis case, as appears in the opinion of the Court of Appeals, the motion to reinstate the case under the rule was filed after the adjournment of the term of the Court at which the case was dismissed and about eight months after the entry of its dismissal. In the pending case the motion under consideration was filed after the term of the Court at which the case was dismissed, and something more than eight months after the entry of its dismissal.

Perhaps it should be stated at this point, that in the Nealon-Davis case the motion to vacate the entry of dismissal was granted and the case reinstated. There then followed certain interlocutory proceedings that have no bearing upon the vital question presented to the Court of Appeals or to the pending case. The lower court reconsidered the order vacating the entry of dismissal

"and held that it was void, for the reason that at the time when the motion for revival was filed the court had lost jurisdiction of the case because of the expiration of the six months extension *following the entry of dismissed.*" (Underscoring supplied.)

The Court of Appeals held that the order vacating the dismissal of the case was right, and then its opinion uses the following language:

"The rule of court under which the cause was first dismissed was not unreasonable, for it permitted the interested parties at any time *within six month after a dismissal* to apply for a revival of the case, and it extended the term of court for six months for that purpose." (Underscoring supplied.)

The Court of Appeals further declares that the order setting aside and vacating the dismissal of the cause "was void for want of jurisdiction of the court over the case at that time", and that, therefore, the order vacating the order, which, in turn, had vacated the dismissal of the cause, the former order being the one appealed from, was correct, and it was affirmed.

It seems clear to this Court that the Court of Appeals necessarily construed the standing rule of this Court involved, that construction being that the six months period allowed by the rule in which to move to reinstate a case dismissed under the rule, begins to run from the date of the *entry of dismissal,* and *not from the expiration of the term* of the Court in which that dismissal takes place. This being so, the Court, under the doctrine announced by the Court of Appeals, is now without jurisdiction to grant the pending motion, and, therefore, it must be denied or overruled. And it is so ordered.

F. L. SIDDONS,
Justice.

March 28th, 1927.

21 Supreme Court of the District of Columbia.

Monday, March 28th, 1927.

Session resumed pursuant to adjournment, Mr. Justice Siddons, presiding.

* * * * * * *

Upon consideration of the motion of the plaintiff filed herein on the 30th day of September, 1926 to revive said cause and restore said cause to the trial calendar, and heretofore argued and submitted, it is ordered that said motion be, and the same is hereby overruled.

Wednesday, March 30, 1927.

Session resumed pursuant to adjournment, Mr. Justice Siddons, presiding.

* * * * * * *

Now comes the plaintiff herein by his attorney of record, and from the judgment of this Court entered herein on the 28th day of March, 1927 notes an appeal in open Court to the Court of Appeals; whereupon the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the Clerk in lieu thereof.

Memoranda.

April 21, 1927.—$50 deposited by plaintiff in lieu of bond. Proposed Bill of Exceptions, etc., filed.

22 *Assignment of Errors.*

Filed April 23, 1927.

* * * * * * *

1. The Court erred in overruling the motion of the plaintiff filed September 30, 1926, to vacate the order of Court passed on the 26th day of January, 1926, dismissing the cause W. P.

2. The Court erred in holding that it had lost jurisdiction of the cause at the time of the filing of the motion to revive on September 30, 1926, by reason of the provisions of Rule #74 of the Supreme Court of the District of Columbia.

3. The Court erred in construing the provisions of Rule #74 of the Supreme Court of the District of Columbia.

4. The Court erred in holding that Rule #74 of the Supreme Court of the District of Columbia required that a motion to revive a cause dismissed W. P. must be filed within six months after the date of such dismissal rather than within six months after the expiration of the term of Court in which such dismissal was ordered.

5. The Court erred in adopting that one of two reasonable constructions or interpretations of Rule #74 of the Supreme Court of the District of Columbia which would bear most heavily upon the plaintiff who relied upon a reasonable construction of said rule and who was prejudiced by the construction so adopted by the Court.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

Designation of Record.

Filed April 23, 1927.

* * * * * * *

The Clerk will please prepare the record for appeal in the above entitled cause to the Court of Appeals of the District of Columbia, to consist of the following records:

1. Declaration.

23 2. Memorandum: Defendant Frazier personally served May 26, 1924, others not found.

3. Memorandum: Pleas of defendant Frazier and appearance of W. Gwynn Gardiner and J. Wm. Tomlinson for defendant Frazier filed July 16, 1924.

4. Memorandum: Dismissed W. P., January 26, 1926.

5. Motion of plaintiff to revive cause, notice, affidavit in support thereof and acknowledgment of service.

6. Affidavit of defendant Frazier in opposition to said motion.

7. Memorandum opinion denying motion.
8. Order of March 28, 1927, overruling motion to reinstate cause and vacate order of dismissal of January 26, 1926.
9. Appeal noted in open court.
10. Memorandum: Bond for costs filed the 21st day of April, 1927.
11. Bill of exception filed on the 21st day of April, 1927, notice and acknowledgment.
12. Memorandum: Bill of exceptions submitted and signed on the — day of ——, ——.
13. Assignment of errors.
14. Bill of Exceptions.
15. This designation.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

Service of copy of the above Designation of record accepted this 22nd day of April, 1926.

W. GWYNN GARDINER,
Attorney for Defendant Frazier.

24 Supreme Court of the District of Columbia.

Friday, June 3, 1927.

Session resumed pursuant to adjournment, Mr. Justice Siddons presiding.

* * * * * * *

Upon consideration of the defendants' motion filed herein to strike out the plaintiff's Bill of Exceptions herein filed, it is ordered that said motion be, and the same is hereby, granted, and said Bill of Exceptions is stricken from the files.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing

pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 68915 at Law, wherein Alfred M. Endner is Plaintiff and Samuel D. Frazier et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 16th day of September, 1927.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4633. Alfred M. Endner, appellant, vs. Samuel D. Frazier et al. Court of Appeals, District of Columbia. Filed Sep. 21, 1927. Henry W. Hodges, clerk.